IP 04-1180-C H/K USA v Espinoza
Judge David F. Hamilton Signed on 08/15/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
vs.	)	NO. 1:04-cv-01180-DFH-TAB
	)	
HILARIO ESPINOZA,	)	
	)	
Defendant.	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO. 1:04-cv-1180-DFH-TAB
	)	
HILARIO ESPINOZA,	)	
	)	
Defendant.	)	

ENTRY

This case is before the court on the petition of Hilario Espinoza-Sarco pursuant to 28 U.S.C. § 2255. On October 7, 2003, Espinoza pled guilty to one count of conspiracy to distribute and to possess with intent to distribute quantities of methamphetamine, cocaine, and marijuana. The court sentenced Espinoza the same day to 123 months in federal prison, followed by five years supervised release.

Espinoza did not appeal the conviction or the sentence. On July 15, 2004, Espinoza filed a petition for a writ of habeas corpus under 28 U.S.C. § 2255 alleging that his attorney provided ineffective assistance of counsel by failing to file a notice of appeal as Espinoza instructed. The government has responded to the petition with evidence from the attorney to the effect that Espinoza waived his right to appeal after conferring with the lawyer. The factual dispute prompted an

evidentiary hearing with testimony from both Espinoza and his former attorney, Bruce D. Brattain.

The applicable law here is clear. If a client in Espinoza's situation tells his attorney to file an appeal, the attorney has an obligation to file the appeal to protect the client's rights even if the attorney believes there is no non-frivolous claim to raise on appeal. *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000); *Castellanos v. United States*, 26 F.3d 717 (7th Cir. 1994). Such abandonment amounts to ineffective assistance of counsel, and the defendant is not required to show prejudice, meaning he is not required to show that he was likely to prevail on the appeal that was not taken. *Rodriquez v. United States*, 395 U.S. 327, 329-30 (1969); *Castellanos*, 26 F.3d at 719.

As in *Castellanos*, the central factual issue here is whether Espinoza instructed attorney Brattain to file an appeal. Espinoza testified that he did and that Brattain refused. Brattain testified that Espinoza did not instruct him to appeal and that he knew he could not refuse such an instruction if it was given. As explained below, the court finds by a preponderance of the evidence that Espinoza did not instruct Brattain to appeal but instead chose to waive his right to appeal, particularly since there were no viable claims on appeal.

Findings of Fact

Espinoza was one of nine defendants in *United States v. Soto-Nava, et al.*, No. IP 02-141-CR, in which the indictment alleged a conspiracy to distribute and to possess with intent to distribute (a) 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, (b) 50 grams or more of methamphetamine, (c) 500 grams or more of a mixture or substance containing a detectable amount of cocaine, and (d) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana. Espinoza was indigent and requested appointment of counsel pursuant to the Criminal Justice Act. The court appointed attorney Brattain, an experienced criminal defense attorney who is and has been a member of the Criminal Justice Act defense panel in this district. Attorney Brattain entered his appearance on February 25, 2003.

The government and defense entered into plea negotiations. The government drafted a plea agreement that would have required Espinoza to waive his right to appeal. Upon advice of Brattain, Espinoza chose not to accept that offer. Instead, he filed a petition to enter a plea of guilty to the indictment without a plea agreement. The petition was filed on July 25, 2003. The filing of the petition triggered a pre-sentence investigation by the Probation Office. The case was ready for a combined hearing for plea and sentence on October 7, 2003.

The court went through the usual guilty plea colloquy. Espinoza is not a native speaker of English. An interpreter was available during the hearing, but Espinoza said he did not need to rely on the interpreter. Plea Tr. 4. (There is no

claim here that Espinoza was unable to communicate effectively with Brattain.) During the guilty plea colloquy, the court discussed the subject of the "safety valve" under Section 5C1.2 of the Sentencing Guidelines and 18 U.S.C. § 3553(e), which would allow the court to sentence below an otherwise applicable mandatory minimum sentence and would allow a further reduction in the guideline offense level. The pre-sentence report had recommended giving Espinoza the benefit of the safety valve. Plea Tr. 10. By the time of the hearing, however, the parties had actually agreed that the safety valve should not apply. Espinoza had not been willing to tell the government all he knew about the distribution network in which he had been involved, as required to qualify for the safety valve. Plea Tr. 10-11, see also Plea Tr. 31. As a result, during the plea colloquy, Espinoza understood that the guideline range would probably be 135 to 168 months in prison rather than the range of 108 to 135 months in the pre-sentence report.

After Espinoza pled guilty and the court accepted the plea, the case proceeded to sentencing. The government and the defense agreed that the base offense level was 36 based on the relevant quantities of drugs. The government and the defense also agreed that Espinoza was not entitled to the safety valve reduction under U.S.S.G. § 5C1.2. Attorney Brattain acknowledged the unusual nature of that agreement, but he said it was based on discussions with the prosecutor. Plea Tr. 27-28. Espinoza himself acknowledged that he was not entitled to the safety valve because he had chosen not to give complete

information about the crime, out of concern for the safety of his family in Mexico. Plea Tr. 31.

The court found that the applicable guideline range was 135 to 168 months and that a sentence at the bottom of the range was sufficient. The court also found that a further downward adjustment of 12 months was appropriate pursuant to Application Note 2 to U.S.S.G. §5G1.3 to account for a discharged state sentence for some of the same conduct. The court thus imposed a sentence of 123 months in federal custody, five years supervised release, and no fine. The court rejected the defendant's argument for a downward departure based on harsh conditions of pretrial confinement at the Marion County Jail.

At the conclusion of the sentencing hearing, the court advised Espinoza that he had the right to appeal his conviction and/or sentence. Plea Tr. 44-45. The court concluded: "I'll leave that for discussion between you and your lawyer as to whether you want to appeal and whether there are any grounds to do so." Plea Tr. 45.

We now turn to the pivotal event. The preponderance of the evidence shows that attorney Brattain went to the Marion County Jail on October 13, 2003 to visit Espinoza and to discuss whether he wanted to appeal. Brattain found that Espinoza had been transferred by the Marshals Service to the Henderson County Jail in Henderson, Kentucky. The next day, October 14, 2003, Brattain placed a

telephone call to Espinoza that lasted 17.4 minutes. During that telephone conversation, they discussed whether Espinoza should appeal.

Espinoza testified that he asked attorney Brattain to appeal and that Brattain said no because there were no viable issues to raise on appeal. Espinoza also testified that he and Brattain did not discuss specific issues to appeal but that he, Espinoza, had two in mind: (1) his expectation that he would face a sentence of 108 months, and (2) his entitlement to the safety valve reduction as long as he was forthright about his own actions, without needing to give the government truthful and complete information about others' actions. According to Espinoza, the telephone call ended with Brattain stating that he would not file a notice of appeal. There is no evidence of any later contact between Espinoza and attorney Brattain.

Brattain testified at the hearing that he did not recall the conversation independently. On October 14, 2003, he made a note on a standard form he uses to show that Espinoza had waived his right to appeal. Ex. 4. Brattain also testified that he was familiar with his duties as a criminal defense attorney and that he knew the client controls whether to appeal. He testified that he had no reason to write that Espinoza had waived his right to appeal if he had not done so, and that if Espinoza had told him to file an appeal, he would have done so.

Espinoza attacks Brattain's credibility in several ways. In an affidavit filed with the court on December 1, 2004, Brattain testified: "On October 14, 2003, I met with Espinoza at the Marion County Jail and thoroughly discussed his appeal rights with him. This was seven (7) days after his sentencing on October 7, 2003. At that time, we discussed his appeal rights and a Notice of Status of Appeal ("Notice") was presented to him by me. He would not sign the Notice." It is now clear to everyone, including Brattain, that this sworn testimony was incorrect. Brattain does not recall those sorts of details, at least accurately. He now acknowledges that the affidavit was reconstructed based on what he thought probably happened, but which he now knows could not have happened in person because Espinoza was not in the Marion County Jail at the time.

Espinoza also points out that Brattain's time records are not reliable as to details here. His unedited records indicate 1.5 hours on October 13, 2003 for "conference with client" and no time for October 14, 2003. His voucher for payment under the CJA billed 1.0 hour for October 13th for "conference with client." There was no conference on October 13th. The court finds the most likely event was that Brattain visited the Marion County Jail on the 13th and found that Espinoza was no longer there. He then tracked Espinoza down in the Henderson County Jail and reached him by phone on the 14th. One hour is a reasonable estimate of the total time Brattain devoted to the case on the two days, though the billing records were obviously wrong as to the details.

Espinoza also attacks Brattain's credibility because he described the conversation about appeal as "thorough" in his affidavit. Brattain no longer actually recalls the conversation, and Espinoza argues the discussion could not have been thorough in the 17-minute phone call on October 14th.

Espinoza has his own credibility problems. His testimony that he expected the benefit of the safety valve and a sentence of 108 months is contrary to his statements at the time of the guilty plea colloquy. In that colloquy, he acknowledged that he had chosen not to tell the government about others in the drug distribution network and that he was not entitled to the safety valve reduction. Plea Tr. 10-11; see also Plea Tr. 27-28 (defense agrees that Espinoza does not qualify for safety valve), Plea Tr. 31 (defendant explains why he could not give information about some people to protect safety of family in Mexico, though the result would mean denial of the safety valve). Espinoza also testified that he did not recall that the court advised him about his appeal rights at the end of the sentencing hearing. In fact, the court did advise him of those appeal rights. See Plea Tr. 44-45.

Upon weighing the evidence, including the demeanor of the witnesses and all available documents and corroborating or contradictory evidence, the court finds by a preponderance of the evidence that Espinoza did not instruct attorney Brattain to file a notice of appeal. Several factors are important in this finding.

First, there were no viable issues for appeal. Espinoza fully understood that he did not qualify for the safety valve. He nonetheless went forward with his guilty plea. Both he and his lawyer acknowledged that he did not qualify for the safety valve. The court rejected the defense request for a downward departure based on conditions at the Marion County Jail. That denial was not reviewable on appeal. See Tr. 43 (downward departure not "justified in this case"); see generally *United States v. Poff*, 926 F.2d 588, 590-91 (7th Cir. 1991) (*en banc*) (no appellate review of discretionary decision not to depart, though defendant could challenge on appeal a district court's erroneous belief that it had no discretion to exercise). Espinoza's sentence was actually below the bottom of the applicable guideline range to account for a discharged state sentence for the same conduct, and the court imposed the minimum period of supervised release and imposed no fine. An appeal could not have produced a sentence more favorable to Espinoza, in light of his agreement that the safety valve was not available to him. Brattain is a capable and experienced criminal defense lawyer. It is highly likely that he recognized the lack of any viable issue on appeal, which is consistent with Espinoza's testimony to the effect that Brattain told him there was nothing to appeal. The lack of any viable issue on appeal tends to weigh against any finding that Espinoza actually wanted to appeal at the time.[1]

[1]The Seventh Circuit explained in *Castellanos* that a defendant whose lawyer fails to comply with a request to appeal is entitled to relief under § 2255 without showing there would have been viable issues on appeal. 26 F.3d at 718. That reasoning does not, however, prevent the court from considering prospects for appeal as part of the relevant factual background when evaluating, based on all the evidence, whether the defendant did or did not tell his lawyer to appeal.

Second, based on his experience, Brattain fully understood that if his client instructed him to appeal, he was obligated to do so even if he thought such an appeal would have been frivolous. His knowledge and experience weigh against the possibility that he made such an egregious mistake in this case.

Third, Brattain's credibility problems from his affidavit and his time records are certainly troublesome, but they do not persuade the court that he made the error charged in this case. His mistakes are of fairly common types. In the affidavit he testified with too much confidence and too much detail to the effect that what should have happened actually did happen. In fact, he had no specific memory of the events. Also, the time records were sloppy, though the total time billed was reasonable. These errors relate to details. They show the fallibility of human memory both in general and in the case of Brattain. The failures of memory do not convince the court, however, that Brattain committed an attorney's cardinal sin of omission – failing to file an appeal upon a client's instructions.

Fourth, we can be confident that Brattain and Espinoza in fact talked on the telephone for something less than 17 minutes on October 14, 2003, and that they talked about whether Espinoza should appeal. Brattain filled out for his own file Exhibit 4, the record noting that Espinoza had decided not to appeal. Brattain simply had no reason to fill that out in an inaccurate way. The time available seems to the court to have been ample time for Brattain to explain to Espinoza

that the sentence was as favorable as possible under the law and that there was no viable basis for an appeal.

Fifth, in addition to Espinoza's own credibility problems, the court believes the most likely explanation for Espinoza's testimony about the telephone call is that he now believes he asked Brattain to appeal despite the absence of viable issues on appeal. Espinoza is in prison with plenty of time to replay and reconstruct the events in his mind, whether accurately or not. Brattain is not the only witness whose memory has been clouded by beliefs about what should have happened or what the witness wishes had happened.

Conclusion of Law

Petitioner Espinoza has not shown by a preponderance of the evidence that he instructed attorney Brattain to appeal and that Brattain failed to do so. Accordingly, Espinoza has not shown that he was denied the effective assistance of counsel in pursuing an appeal.

Espinoza's petition under 28 U.S.C. § 2255 raised two additional issues. In Ground Two, Espinoza alleged that he was denied effective assistance of counsel at sentencing because he should have qualified for the safety valve. In Ground Three, Espinoza alleged that he was denied his Sixth Amendment right

to a jury trial on drug quantity issues that resulted in enhancement of his sentence. (As part of Ground Three, Espinoza also asserts that his counsel was ineffective by not arguing *Apprendi v. New Jersey*, 530 U.S. 466 (2000).) The court believes the record is now sufficient to resolve these issues, but if either party wishes to supplement the existing record, an additional brief may be filed within 30 days of the entry of this entry. If either party files an additional brief, the opponent may file a further reply within 21 days.

So ordered.

Date: August 15, 2005

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

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